

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MICROSOFT CORPORATION,
a Washington Corporation,

Plaintiff,

vs.

KAI-FU LEE and GOOGLE INC., a
Delaware corporation,

Defendants.

No. 05-2-23561-6 SEA

ORDER GRANTING MOTION TO
INTERVENE AND GRANTING, IN PART,
MOTION TO UNSEAL DOCUMENTS

THIS MATTER having come before the court upon The Seattle Post Intelligencer and The Seattle Times Company's Motion to Intervene and Unseal Documents, and the court having heard oral argument and having reviewed in-camera the three documents in question, and having reviewed the Plaintiff's Motion to Retain Documents Under Seal with attached declarations, The Seattle Post Intelligencer's Motion to Intervene and Unseal Documents,¹ and the Joinder by The

¹ The Wall Street Journal submitted a letter in support of the Motion to Intervene and Unseal Documents. The letter was not accompanied by a motion to intervene and does not appear to have been filed publicly. Therefore, a copy of the letter, without attachments, is attached to this order.

1 Seattle Times Company, and being otherwise sufficiently advised in the premises, the court
2 makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- 3 1. The public, including the press, has a right to intervene in lawsuits for the limited purpose
4 of representing the public's right of access to judicial proceedings. *Press-Enterprise Co.*
5 *v. Superior Court*, 478 U.S. 1 (1986).
- 6 2. The Seattle Post-Intelligencer and The Seattle Times Company (Intervenors) seek to
7 exercise their rights under the First Amendment to the United States Constitution and
8 under Washington Constitution Article I, Section 10.
- 9 3. Under Washington Const. art 1 § 10, "Justice in all cases shall be administered openly."
10 "The right of the public, including the press, to access trials and court records may be
11 limited only to protect significant interests, and any limitation must be carefully
12 considered and specifically justified." *Dreiling v. Jain*, 151 Wn.2d 900, 904 (2004).
13 "Openness of courts is essential to the courts' ability to maintain public confidence in the
14 fairness and honesty of the judicial branch of government as being the ultimate protector
15 of liberty, property, and constitutional integrity." *Allied Daily Newspaper of Washington*
16 *v. Eikenberry*, 121 Wn.2d 205, 211 (1993) (holding unconstitutional a law requiring the
17 sealing of information identifying child victims of sexual assault).
- 18 4. The Washington Supreme Court has articulated five factors to be applied in considering
19 whether to seal judicial proceedings or documents from public view:
 - 20 1) The proponent of closure or sealing must make some showing of the need for
21 doing so, and where that need is based on a right other than an accused's right
22 to a fair trial, the proponent must show a "serious and imminent threat" to that
23 right.
 - 2) Anyone present when the closure motion is made must be given an
opportunity to object to the closure.

- 3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
- 4) The court must weigh the competing interests of the proponent of closure and the public.
- 5) The order must be no broader in its application or duration than necessary to serve its purpose.

Allied Daily Newspapers of Washington, 121 Wn.2d 205, 211 (following *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39 (1982)).

These *Ishikawa* factors must be used in determining whether motion papers and documents filed in support thereof may be sealed. *Dreiling*, 151 Wn.2d 900, 904. In making a determination on a sealing issue, the court should articulate on the record findings supporting its judgment. *Id.* at 908. The Washington Supreme Court recently clarified that the *Ishikawa* sealing factors apply to all motions before the court, not just dispositive motions. *Rufer v. Abbott Laboratories*, __ Wn.2d __, 2005 WL 1528792 (Wash. 2005).²

5. The principle of open administration must be balanced against the rights of the litigants, pursuant to the first and fourth *Ishikawa* factors.
6. In order to prevail in its request to file documents under seal, Microsoft has the burden of establishing that the documents contain trade secrets or other confidential research, development or commercial information, the release of which would cause substantial harm to Microsoft. GR 15(c)(2)(B) and Washington's Uniform Trade Secrets Act (WUTSA) RCW 19.108.010 et seq.

² In this order, the court has used some language from the well-written brief submitted by Judith A. Endejan on behalf of The Seattle Post-Intelligencer.

1 14. The court has determined, after weighing the public's right to access against Microsoft's
2 right to protect trade secrets, that sealing Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 in
3 their entirety is not the least restrictive alternative; and

4 15. The court has further determined that, considering the public's right to access court
5 records, Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 should be filed in redacted versions
6 to protect the proprietary information yet disclose the balance of the documents.

7
8 NOW, THEREFORE, IT IS HEREBY ORDERED that the Intervenor's Motion to
9 Intervene is GRANTED for the limited purpose of contesting requests to file documents under
10 seal. It is further ordered that Plaintiff file under seal the unredacted version of Plaintiff's
11 Exhibit 1 and Plaintiff's Exhibit 2. They shall remain under seal until further order of the court.
12 The Intervenor's Motion to Unseal Documents is GRANTED, in part, as follows: the redacted
13 versions of Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 are unsealed and attached to this order.
14 Plaintiff's Exhibit 3 is attached and is unsealed in its entirety.

15 The court anticipates that Microsoft and Google may seek to file documents under seal
16 during the balance of this case. The parties shall submit to the Discovery Master all documents
17 that the parties want filed under seal. The Discovery Master shall give Intervenor's an
18 opportunity to be heard before making a report and recommendation to the court regarding future
19 requests to seal. The court will consider objections to the Discovery Master's report and
20 recommendation before ruling.

21 DATED this 2nd day of August, 2005

22 
23 Judge Steven González

Subject: KFL:Billg Search Discussion
Location: 34/5320

Start: Tue 5/18/2004 12:30 PM
End: Tue 5/18/2004 1:00 PM

Recurrence: (none)

Meeting Status: Meeting organizer

Required Attendees: Bill Gates; Christine Turner; Bonnie Hamilton

Tuesday, May 18th 12:30-1:00 PM

Topic: Kai-Fu's thoughts & suggestions on search

Attendees: Billg and KFL

Thanks
Bonnieha
5/17/2004

BillG 1:1 on Search
Kai-Fu Lee

Client Search

- [REDACTED] Google [REDACTED]
 - [REDACTED] Longhorn [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - Longhorn [REDACTED]
 - Suggestion:
 - [REDACTED] Longhorn, MSN [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED] Google.
- ↓

General Search & Google-compete

- Assuming [REDACTED]
 - [REDACTED]
 - Positives:
 - Good [REDACTED]
 - [REDACTED]
 - Clear [REDACTED]
 - Able to [REDACTED]
 - Challenges
 - No [REDACTED]
 - No [REDACTED]
 - No [REDACTED]
 - No [REDACTED]
 - Suggestions:
 - [REDACTED]
 - Find a way to [REDACTED] Longhorn [REDACTED]
- Possible

Johnson, Jeffrey (SEA)

From: Enwei Xie
Sent: Wednesday, June 22, 2005 3:01 PM
To: Michele Evans; Scott Slipy; Connie Kang
Cc: Gill Wang (HR); Hong-Jiang Zhang; Ivy Leung; Emre Demokan; Kai-Fu Lee
Subject: MS confidential - Feedback on new salary structure for China...

Importance: High



Michelle Draft New
Salary Stru...

Gill had shared info with me regarding China salary [REDACTED]. I am quite certain that the proper market research had been conducted but do like to share my thoughts. I might very well be off the marker here since I do not have the view of your research. So, I do apologize ahead of time if that is the case.

Concern: [REDACTED]

Currently, MS is [REDACTED]

Google.

Google

With this in mind,

Google

Thanks,
-enwei

From: Michele Evans
Sent: Monday, April 18, 2005 8:49 PM
To: Connie Kang; Mei Chen (Fesco)
Cc: Gill Wang (HR); Ivy Leung; Scott Slipy
Subject: RE: Draft New Salary Structure for China

Sensitivity: Confidential

Hi Connie, I was going to wait [REDACTED]

probably this would wait until a week or two. [REDACTED] So

Do you agree or do you want to send out sooner than this?

Thanks,

Michele

From: Connie Kang
Sent: Monday, April 18, 2005 9:05 AM
To: Michele Evans; Mei Chen (Fesco)
Cc: Gill Wang (HR); Ivy Leung; Scott Slipy
Subject: RE: Draft New Salary Structure for China
Sensitivity: Confidential

Michele,
 Besides [REDACTED]

I would like to suggest that you

Mei can provide more background on [REDACTED]

BTW, I assumed that you will send similar note to [REDACTED] yes, please send us first for input before sending to Wing.
 thank

From: Michele Evans
Sent: Sunday, April 17, 2005 11:44 PM
To: Harry Shum; Hong-Jiang Zhang
Cc: Gill Wang (HR); Ivy Leung; Mei Chen (Fesco); Scott Slipy; Connie Kang
Subject: Draft New Salary Structure for China
Sensitivity: Confidential

Hi Harry and Hong-Jiang,

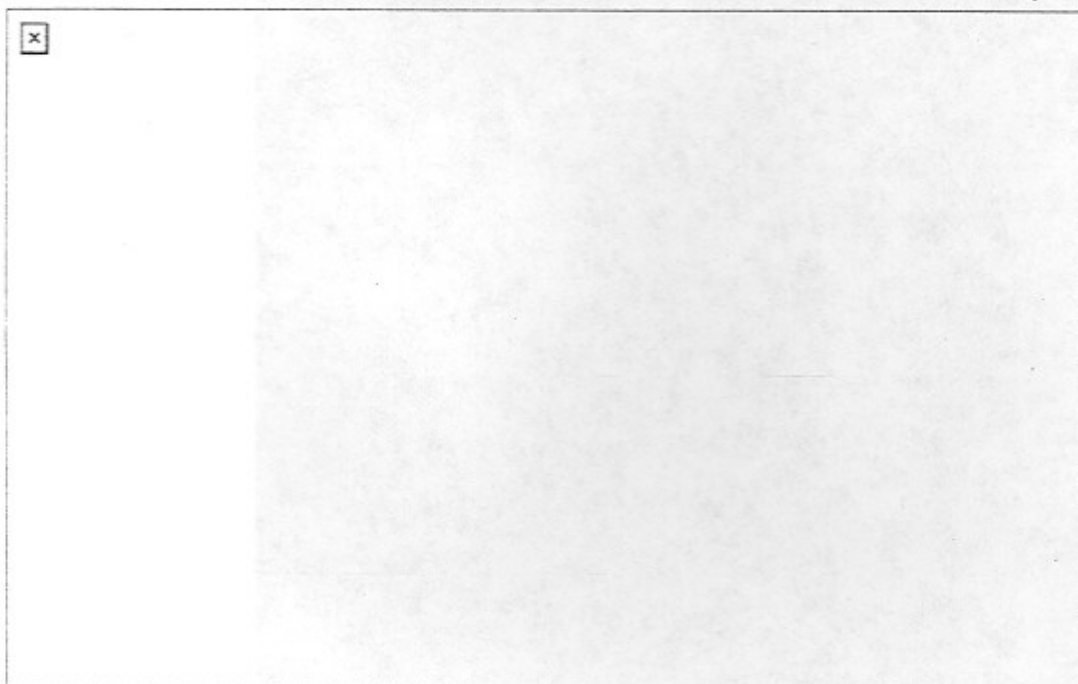
Thanks you for meeting with us [REDACTED] As an outcome of our meeting and meeting with other leaders [REDACTED]

Below is our draft of the new structure. I am interested in having you [REDACTED]

Just so you know [REDACTED]

[REDACTED]	Old	New Draft	New Structure
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Attorneys' Eyes Only



Please let me know your thoughts here. If you would like to set up time to discuss we are happy to do so.

Thanks,

Michele

14

Attorneys' Eyes Only

ATTACHMENT A

1. Kai-Fu Lee agrees to fully comply with the terms of the Employment Agreement or other agreements he signed with Microsoft Corporation (collectively the "Employment Agreement"). The Employment Agreement contains provisions restricting Kai-Fu Lee from post-employment competition (para. 9), indirect and direct solicitation of Microsoft employees or the employees of Microsoft subsidiaries (para. 9), and obligations that prohibit any disclosure or use of any Microsoft trade secrets or confidential information (para. 3). Kai-Fu Lee represents and agrees that he has not and will not use, disclose, or bring into Google any Microsoft trade secret or confidential information and Google represents and agrees that it has not and will not ask Mr. Lee to use, disclose or bring into Google any Microsoft trade secret or confidential information, provided that Mr. Lee agrees to notify Google in the event that Google asks for information that Mr. Lee believes would require him to disclose confidential or trade secret information of Microsoft. In addition, Kai-Fu Lee agrees that and that he will not solicit, directly or indirectly, any employees of Microsoft, or its subsidiaries.

2. So long as Kai-Fu Lee complies with the terms of this Attachment, Google agrees to indemnify and defend him against any claims by Microsoft arising out of any alleged breach of the non-competition, non-disclosure of trade secrets and confidential information, or non-solicitation provisions of the Employment Agreement; provided, however, Google's duty to indemnify and defend will arise only upon notification by Mr. Lee of any such claims and his tender of the defense of such claims to Google. Upon and from the time of such notification, Google ~~Lee~~ shall engage and direct counsel of Google's choosing in order to defend Kai-Fu Lee against said non-competition, non-disclosure of trade secret and confidential information, and non-solicitation claims, and no other claims.

3. If Microsoft successfully enjoins Kai-Fu Lee from working at both Microsoft and Google due to the non-competition and/or nondisclosure provisions of the Employment Agreement, and so long as Mr. Lee has complied with and continues to comply with the terms of this Attachment, to the extent permitted by law and court order, Google agrees to place Mr. Lee on a paid leave of absence or consulting engagement for the duration of the injunction, up to twelve (12) months from the date of first employment with Google. Google agrees to provide the salary, bonus, benefits (including expatriate benefits), and, to the extent permitted, stock option vesting that Mr. Lee would have received if he were employed by Google under the terms of the Offer Letter into which this Attachment A is incorporated, and if not so permitted, to take appropriate steps to make Mr. Lee whole for the period he remains without employment, up to twelve (12) months from the date of first employment with Google.

4. If Kai-Fu Lee is enjoined from working pursuant to Paragraph 3 above, he will be placed in a position at Google following the injunction period, if not more than twelve (12) months in length, and subject to Google's discretion. Should Mr. Lee be terminated for cause (as defined) from or voluntarily quit his employment with Google at any time during the period of enjoinder or the first year of actual service to Google during the two years following his date of hire with Google for reasons other than those set forth in paragraphs 6 below:

A. Kai-Fu Lee will immediately return to Google all compensation paid to him under paragraph 3.

B. Vested, unexercised stock options and Google Stock Units (GSU's) will be forfeited;

C. Exercised, retained stock options and GSU's will be subject to re-purchase by Google for the initial option/GSU price; and

D. Any proceeds from purchased stock options and/or GSU's will be held by him in trust for a period of twelve (12) months from the expiration of the paid leave of absence, and returned to Google immediately upon termination or resignation of the same occurs before the second anniversary of employment.

5. For purposes of this Attachment, "Cause" is defined as:

A. Breach of the Employment Agreement.

B. Breach of any Google non-solicitation, confidentiality, work product and copyrights, and/or inventions assignment provisions.

C. Any failure to perform assigned job responsibilities that continues unremedied for a period of thirty (30) days after written notice to Kai-Fu Lee by Google, other than due to a substantive modification of job responsibilities by Google during two years following his date of hire with Google.

D. Conviction of a felony or misdemeanor or failure to contest prosecution for a felony or misdemeanor.

E. Google's reasonable belief that Kai-Fu Lee engaged in unethical or illegal practices, dishonesty or disloyalty.

The parties agree that paragraph 4 is inapplicable unless the terms of paragraph 3 occur.

6. The parties agree that paragraph 4 is inapplicable unless Mr. Lee is enjoined pursuant to the terms of paragraph 3. In addition, the parties agree that paragraph 4 is inapplicable in the event of the following:

A. Kai-Fu Lee is unable to return to work due to death or disability (defined as the complete inability to perform the duties of his job for a period of 180 consecutive days or 180 days in the aggregate within twelve (12) months);

B. If immediately following the injunction period of up to twelve (12) months, Google terminates Mr. Lee for reasons other than Cause or the violation by Mr. Lee of the provisions of this Attachment.

7. In the event that Google elects for any reason to withdraw or rescind the offer of employment prior to Mr. Lee's agreed upon start date for any reason other than at the request of Mr. Lee, Google will provide
All other terms of the offer will be withdrawn.

8. 5. Kai-Fu Lee agrees that during any period he is being paid pursuant to paragraph 3 above, he is not permitted to perform work, including but not limited to performing as an employee, consultant or advisor, for any company or business, without express written permission from a Vice President of Engineering or the Vice President of Human Resources at Google.

9. Google agrees that in the event of any settlement of a litigation matter with Microsoft which would impact the duties anticipated to be performed or being performed by Kai-Fu Lee for Google, or which would require relocation from mainland China, Mr. Lee will be provided advance notice regarding any settlement terms applicable to him and allowed to provide reasonable input as to said terms.



Stuart D. Karle
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July 29, 2005

By FedEx & Facsimile - (206) 296-0986

Hon. Steven Gonzalez
King County Superior Court
516 Third Avenue
Seattle, WA 98104

Microsoft Corp. vs. Kai-Fu Lee and Google, Inc. (No. 05-2-23561-6 SEA)

Dear Judge Gonzalez:

I am the General Counsel of *The Wall Street Journal*, which is published by Dow Jones & Company, Inc., and am writing in support of the Motion of *The Seattle Post-Intelligencer* to Intervene and Unseal certain judicial records filed with the Court. Because of the speed at which the Court, quite helpfully, has been willing to hear this matter, we ask that you accept this faxed letter as the *Journal's* submission on this motion.

The Wall Street Journal is published each business day to 1.8 million readers of its print edition and more than 700,000 paying subscribers to its website, *WSJ.com*. The *Journal's* focus is on news and information that is useful to investors and businesspeople.

The *Journal* will not restate the *Post-Intelligencer's* statement of the applicable law, but would like only to emphasize that Microsoft Corporation bears the burden of persuasion as the party asking this Court to keep from the public evidence upon which this Court will rely in deciding this case.

There is a strong public interest in public access to the specific documents at issue on this motion for several reasons that have been noted in the four stories published in the *Journal* since Microsoft filed its lawsuit. (Copies of these articles accompany this letter.) Microsoft and Google, Inc. compete in the market for two of the most important services that are broadly used by the public, internet search engines and email. The public has a powerful interest in understanding how these companies compete with each other in developing products in these markets, as well as how able their employees are to leave to work for a competitor or create their own new and perhaps better products.

Hon. Steven Gonzalez

July 29, 2005

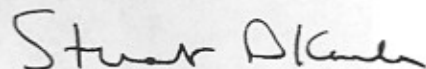
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In addition, hundreds of thousands of investors have a direct financial interest in the performance of these companies. Google, with a market capitalization of \$81 billion, has a public float of approximately 180 million shares; Microsoft has a market capitalization of approximately \$276 billion with a public float of more than 9 billion shares. As both parties have chosen to ask this Court to decide their claims and counterclaims, these hundreds of thousands of investors have an interest not just in learning the outcome of this lawsuit, but in understanding precisely how and on what evidence that outcome is reached. This they will be unable to do if they are denied the greatest possible access to the evidence upon which this Court will rely in reaching its decision.

In recognition of the strong public interest in this litigation, the *Journal* has devoted substantial resources to covering this case, both by publishing four articles in the eight (print and on-line) issues it has published since Microsoft filed its complaint, and by posting on its website links to images of nine pleadings that are on file with the Court.

For the reasons stated above and in the Motion of the *Post-Intelligencer* to Intervene and Unseal, the *Journal* respectfully requests that the Court unseal in its entirety the evidence that Microsoft has filed with the Court in support of its motion, or permit only limited redactions of genuine trade secret information.

Respectfully submitted,



cc (by facsimile and FedEx):

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Hon. Steven Gonzalez

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